IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	**CRIMINAL ACTION**
v.	
MICHAEL SCRIPPS also known as "Michael Scripps Jackson"	**NO. 12-298**

DuBois, J. **June 25, 2018**

M E M O R A N D U M

I. INTRODUCTION

This is a motion for relief pursuant to 28 U.S.C. § 2255 brought by a federal prisoner, Michael Scripps ("defendant"). On December 19, 2017, defendant, represented by counsel, filed the Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Amended Motion") at issue, setting forth seven claims for relief, all for ineffective assistance of trial or appellate counsel. Because defendant's claims are either time-barred or defendant has failed to show that he was prejudiced by any alleged error by counsel, defendant's Amended Motion is denied and dismissed.

II. BACKGROUND

Defendant and his family are the descendants of the wealthy Scripps newspaper family and known for living a lavish lifestyle. Around 2001, defendant encouraged his mother Melissa Scripps and autistic uncle David Scripps to transfer their wealth from trust funds at Bank One to Merrill Lynch under the management of defendant's college friend, Richard Gleeson. Melissa and David did so. Thereafter, with Gleeson's assistance, defendant began to transfer funds from David and Melissa's accounts at Merrill Lynch to his own accounts.

In 2006, Melissa and David reported to Merrill Lynch that funds were missing from their accounts. Thereafter, Melissa and David reported the missing funds to the United States Attorney for the Eastern District of Pennsylvania. On June 14, 2012, a grand jury returned an Indictment against defendant, charging him with seven counts of wire fraud. Gleeson was separately charged with two counts of wire fraud, to which he pled guilty. Following a jury trial, defendant was found guilty on all counts of the Indictment. On July 15, 2013, defendant was sentenced to 108 months' imprisonment and three years' supervised release. The Court also ordered defendant to pay restitution in the amount of $3,634,069. The Third Circuit affirmed defendant's conviction and sentence, and the Supreme Court denied defendant's Petition for Writ of Certiorari on June 8, 2015. On June 7, 2016, defendant filed a *pro se* Motion under 28 U.S.C. § 2255 ("*pro se* Motion"). After the Court appointed Vernon Chestnut to represent defendant, defendant withdrew his *pro se* Motion and, on December 9, 2017, counsel filed the Amended Motion presently pending. Defendant's Amended Motion is ripe for decision.

III. LEGAL STANDARD

A. Statute of Limitations, Relation Back, and Equitable Tolling

Claims for relief under § 2255 must be brought within the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2255(f). Pursuant to § 2255, the one-year statute of limitations begins running from the latest of (1) "the date on which the judgment of conviction becomes final," (2) the date on which an "impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed," (3) the date on which a newly recognized right asserted by the defendant "was initially recognized by the Supreme Court," or (4) the date on which the facts supporting the claims could have been discovered through due diligence. *Id.* Judgment of conviction becomes "final" when the Supreme Court "affirms a conviction on the merits on

direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003).

Claims barred by the AEDPA one-year statute of limitations may "relate back" to a timely-filed original motion where the "original and amended [motions] state claims that are tied to a common core of operative facts." *Mayle v. Felix*, 545 U.S. 644, 661, 664 (2005). In the habeas context, new claims do not relate back where they "depend upon events separate in both time and type from the originally raised episodes." *Id.* at 657.

The AEDPA statute of limitations may be tolled "in light of established equitable considerations" to permit otherwise time-barred claims where "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 617, 618 (3d Cir. 1998) (internal quotation marks and citations omitted). To obtain equitable tolling, a petitioner must show that: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (internal quotation marks and citations omitted). Although "egregious" neglect by an attorney may constitute "extraordinary circumstances" warranting equitable tolling, "a garden variety claim of excusable neglect such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Id.* at 2564.

B. Ineffective Assistance of Counsel

"*Strickland v. Washington* supplies the standard for addressing a claim of ineffective assistance of counsel." *United States v. Smack*, 347 F.3d 533, 537 (3d Cir. 2003). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The *Strickland* standard requires a two-part inquiry. "First, the defendant must show that counsel's performance was deficient" by showing that it fell "below an objective standard of reasonableness," including "[p]revailing norms of practice." *Id.* at 687-88. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Counsel cannot be ineffective for failing to raise a claim without merit or failing to object where there is no underlying error. *Thomas v. Horn*, 570 F.3d 105, 121 n.7 (3d Cir. 2009).

"Second, the defendant must show that [counsel's] deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. With respect to the prejudice prong, the defendant is required to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.* However, "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Strickland*, 466 U.S. at 687). An "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.*

IV. DISCUSSION

In the Amended Motion, defendant raises seven grounds for relief:

1. Trial counsel was ineffective for advising defendant to sign waivers of the statute of limitations for the conduct charged in the Indictment;

2. Trial counsel was ineffective for failing to investigate the accounts of Melissa and David Scripps at Bank One;
3. Trial counsel was ineffective for failing to object to exclusion by the Court of defendant's proposed *voir dire* questions;
4. Trial counsel was ineffective for failing to cross-examine David Scripps on Melissa Scripps's use of the family funds;
5. Trial counsel was ineffective for failing to impeach the testimony of Melissa Scripps with her telephone records;
6. Trial counsel was ineffective for failing to call Thomas Rutherford and Benjamin Dehaven as witnesses; and,
7. Appellate counsel was ineffective for failing to challenge the alleged failure of the Court to address defendant "personally" at sentencing.

Defendant also requests an evidentiary hearing. The Government responds that defendant's first two grounds are barred by the AEDPA statute of limitations and that, with respect to the remaining grounds, he has failed to establish deficient performance or prejudice as required by *Strickland*. For the reasons that follow, the Court denies and dismisses all of defendant's claims without an evidentiary hearing.

A. Ground One: Trial counsel was ineffective for advising defendant to sign waivers of the statute of limitations for the conduct charged in the Indictment.

Defendant first argues that trial counsel's assistance was constitutionally inadequate because counsel advised defendant to sign waivers of the statute of limitations for the conduct charged in the Indictment. Doc. No. 130 at 20. Specifically, defendant contends that his attorneys were "ineffective for advising him to sign the waivers without ensuring that he knowingly and intentionally understood what he was doing." *Id.* at 22. In response, the Government argues that this claim is barred by the AEDPA one-year statute of limitations. Doc. No. 134 at 10-11.

The Court agrees with the Government on this issue. The one-year statute of limitations on defendant's claims expired on June 8, 2016, one year after the Supreme Court denied his Petition for Writ of Certiorari and his conviction became final. Defendant raised this claim for

the first time in his Amended Motion, filed on December 28, 2017, well after the expiration of the AEDPA statute of limitations. Defendant does not argue that this claim relates back to his *pro se* Motion or that he is entitled to equitable tolling. The Court concludes that this claim does not relate back to defendant's *pro se* Motion and that defendant is not entitled to equitable tolling. This claim is thus barred by the AEDPA one-year statute of limitations.

B. Ground Two: Trial counsel was ineffective for failing to investigate the accounts of Melissa and David Scripps at Bank One.

Defendant next argues that trial counsel was ineffective for failing to subpoena Bank One for the financial records of Melissa and David Scripps prior to the transfer of their accounts to Merrill Lynch. Doc. No. 130 at 22. Specifically, defendant claims that counsel was ineffective for conducting "no investigation into the spending practices of Melissa Scripps" to determine if she "authorized wire transfers to Michael's accounts of the scale alleged in the Indictment." *Id.* at 22-23. The Government argues that this claim is barred by the AEDPA one-year statute of limitations. Doc. No. 134 at 11.

The Court agrees with the Government on this issue. As above, defendant raised this claim for the first time in the Amended Motion, filed on December 28, 2017, after the expiration of the AEDPA statute of limitations.

Defendant argues in his Reply that this claim relates back to claims in his *pro se* Motion that (1) "Melissa Scripps committed perjury" and (2) that counsel was ineffective for failing to "question[] David Scripps about how Melissa Scripps was responsible for the squandering of their fortune." Doc. No. 135 at 10. Defendant contends that in order to cross-examine Melissa and David, it was "incumbent" on trial counsel to investigate their accounts at Bank One. *Id.*

Defendant's argument is misplaced. His new claim that trial counsel was ineffective for failing to conduct a specific pretrial investigation differs in both "time and type" from his

original claims regarding the examination of witnesses at trial. In its decision in *Mayle*, the Supreme Court similarly declined to permit a late claim of a coerced confession under the Fifth Amendment *prior* to trial to relate back to a timely claim under the Confrontation Clause that arose *during* trial. 545 U.S. at 652. In rejecting the relation back argument, the Supreme Court reasoned that, unlike the timely Confrontation Clause claim, which depended on the examination of witnesses in court, the late filed Fifth Amendment claim depended on "the character of Felix's conduct, not in court, but at the police interrogation, specifically, did he answer voluntarily or were his statements coerced." *Id.* at 661. The late claim therefore differed in "time and type" from the timely claim and did not relate back.

Similarly, in this case, defendant's new claim depends entirely on counsel's representation prior to trial, while his timely claims turn on the examination of witnesses in court. His late claim regarding counsel's failure to investigate the Bank One records therefore does not relate back to his timely claims. Defendant's Amended Motion is thus denied with respect to this ground for relief.

C. Ground Three: Trial counsel was ineffective for failing to object to exclusion by the Court of defendant's proposed *voir dire* questions.

In his third ground for relief, defendant argues that trial counsel was ineffective for failing to object to the exclusion by the Court of defendant's proposed *voir dire* questions. Defense counsel submitted questions regarding, *inter alia*, the veniremen's work and socioeconomic histories. Doc. No. 130 at 24-25. According to defendant, when the Court instead relied on a "standard *voir dire*" questionnaire, counsel was ineffective for failing to object. *Id.* The Government responds, in part, that defendant has failed to show that any error by counsel prejudiced his defense. Doc. No. 134 at12-14, 15.

The Court agrees with the Government on this issue. Assuming, *arguendo*, that the Court erred in rejecting defendant's proposed *voir dire* questions, defendant has not shown that counsel's failure to object prejudiced his defense. Defendant argues that he was prejudiced because counsel's failure to object both (1) "directly affected the procedure for exposing possible juror bias" at trial and (2) "waived this issue for appeal." Doc. 132 at 26. Because defendant argues that counsel's failure affected the outcomes of both his trial and appeal, the Court considers whether he has shown that he was prejudiced at either stage. For the reasons stated below, the Court concludes that defendant has failed to do so.

Defendant attempts to establish prejudice at trial by arguing that because the jury deliberated for two days and asked the Court five questions during that time, "this case was far from overwhelming." Doc. No. 135 at 14. Thus, according to defendant, "there is a reasonable probability that the outcome would have been different had the jury venire had been specifically questioned about the[] matters" contained in his proposed *voir dire* questions. *Id.*

Defendant's argument is misplaced. To establish prejudice for ineffective assistance during *voir dire*, defendant must show that, absent counsel's ineffective assistance, "there is a reasonable probability" the jury would have voted to acquit defendant. *Breakiron v. Horn*, 642 F.3d 126, 146 (3d Cir. 2011); *United States v. Calhoun*, 600 Fed. Appx. 842, 846 (3d Cir. 2015) ("[T]he proper prejudice inquiry is whether there is a reasonable probability that [defendant] would have been acquitted"). In his argument, defendant addresses only the impact of the failure of the Court to ask his proposed *voir dire* questions, and not the impact of counsel's failure to object. Defendant has argued only that, had the *Court* asked his proposed questions during *voir dire*, the outcome of the proceeding may have been different. That is not the burden that defendant must carry. Nowhere does defendant make the required showing that had *trial counsel*

objected to the exclusion of his proposed *voir dire* questions, the trial court would have sustained the objection and asked the questions, and that, as a consequence of asking the questions, there is a reasonable probability that the outcome of the trial would have been different.

Further, defendant argues that trial counsel was ineffective for waiving this issue for appeal by not objecting when the Court did not ask his proposed *voir dire* questions. The Court rejects this argument, on the ground that defendant has not shown that there is a reasonable probability that the outcome of his appellate proceedings would have been different had the proposed questions been asked.[1] On this issue, the Third Circuit has stated that "there is no automatic reversal" for the failure of a trial court to ask proposed questions during *voir dire*. *Butler v. City of Camden*, 352 F.3d 811, 818 (3d Cir. 2003) (citing *Paine v. City of Lompoc*, 160 F.3d 562, 565 (9th Cir. 1998)). Instead, an appellate court must consider the extent to which the jurors' potential biases are "covered in other questions on *voir dire* and on the charge to the jury" and "the extent to which the trial court's charge to the jury may have remediated any prejudice." *Id.* Defendant does not contend that he could have made such a showing on appeal, and thus he has failed to show that there is a reasonable probability that the outcome of his appellate proceedings would have been different had trial counsel preserved this issue for appeal.

D. Ground Four: Trial counsel was ineffective for failing to cross-examine David Scripps on Melissa Scripps's use of the family funds.

Defendant next argues that trial counsel was ineffective for failing to cross-examine his autistic uncle, David Scripps; defendant contends that cross-examination would have shown that

[1] Neither defendant nor the Government have identified cases addressing ineffective assistance of trial counsel for waiving issues for appeal, and the Court was unable to locate any. Because waiver of an issue for appeal precludes an appellate court from determining the issue on the merits, this Court will apply the same standard as applied to claims that appellate counsel was ineffective for failing to raise a claim on appeal. *See United States v. Mannino*, 212 F.3d 835, 844 (3rd Cir. 2000) ("The test for prejudice under *Strickland* is not whether petitioner[] would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal.").

"Melissa Scripps spent not just her all of her money, but her brother's as well." Doc. No. 135 at 16. According to defendant, trial counsel's failure to cross-examine David on Melissa's use of his wealth, his relationship with Melissa, and his relationship with defendant "left [defendant] completely defenseless." Doc. No. 130 at 27-28. The Government argues in response that "[s]ubjecting David to vigorous cross-examination . . . would have only further highlighted his frailties and cognitive deficiencies and evoked sympathy from the jury." Doc. No. 134 at 16. According to the Government, counsel's decision not to cross-examine David did not prejudice defendant. *Id.* at 17.

The Court agrees with the Government that defendant has not established prejudice with respect to this claim on the ground that there was considerable evidence in the record to support his defense. At the center of defendant's theory of the case was the contention that Melissa Scripps misused the family's funds, and as they "finally diminished to near nothing . . . she claimed that [defendant] misappropriated funds" in order to "receive a significant settlement from Merrill Lynch." Doc. No. 135 at 15. This theory was well supported in the record. At trial, defense counsel called four witnesses, including Melissa's former business partner and defendant's father, both of whom testified as to Melissa's excessive spending.

Likewise, the government presented Bill Johnson, the family accountant, as a witness at trial. Doc. No. 135 at 16. On direct and cross-examination, Johnson testified that when he was hired by the Scripps family, he conducted an assessment of the family funds, and ultimately concluded that, at their then-current rate of spending, the family would deplete their funds in three and a half years. *Id.* at 17. Cross-examination of David Scripps would have added nothing of significance to this record. Thus, defendant has not shown that there is a reasonable

probability that, had defense counsel cross-examined David Scripps, the outcome of the trial would have been different.

E. Ground Five: Trial counsel was ineffective for failing to impeach the testimony of Melissa Scripps with her telephone records.

Defendant's next argument is that that counsel was ineffective for failing to use Melissa's phone records to show that defendant "was in constant contact with [her], particularly on the days that transfers were made." Doc. No. 132 at 28-29. The Government responds, in part, that because the records show only that calls took place, but do not include what was said on those calls, counsel's performance was not deficient for failing to use the telephone records and defendant was not prejudiced. Doc. No. 134 at 17-18.

The Court agrees with the Government on this issue for two reasons. First, defendant must present more than "vague and conclusory allegations" to be entitled to relief under § 2255. *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000). Defendant only broadly states that the phone records "would have proven an enormous level of contact and communication" between himself and Melissa. Defendant does not explain how the records would have contradicted Melissa's testimony or otherwise aided his defense. Doc. No. 130 at 29. Defendant's conclusory allegations are insufficient to warrant the requested relief. *Thomas*, 221 F.3d at 437.

Second, defendant has failed to show prejudice. Defendant contends that the telephone records would have "independently verified" the defense theory that Melissa Scripps claimed that defendant misappropriated the funds in order "to extract a multi-million-dollar settlement from Merrill Lynch." Doc. No. 135 at 19. As an initial matter, defendant fails to show how records of calls between Melissa and defendant, without any indication of what was said, would have "independently verified" the defense theory. Further, as noted above, defendant's theory

that Melissa had squandered the family's funds was well supported by testimony from Melissa's business partner, defendant's father, and the family's accountant. It is difficult to discern what, if anything, Melissa's telephone records would have added to that record. Defendant has not shown that there is a reasonable probability that, had defense counsel introduced Melissa's telephone records in evidence, the outcome of the trial would have been different.

F. Ground Six: Trial counsel was ineffective for failing to call Thomas Rutherford and Benjamin Dehaven as witnesses.

In his penultimate claim, defendant argues that counsel was ineffective for failing to call as witnesses Thomas Rutherford, who would have testified that a trip to an Atlanta strip club by defendant, David, and Melissa took place in 1999 instead of 2002, and Benjamin Dehaven, who would have testified that defendant openly discussed his spending and finances with Melissa. Doc. No. 132 at 30-33. According to defendant, Rutherford's testimony regarding the timing of the Atlanta trip was important because the Government had argued that "the strip club trip and the bankers meeting [prior to transferring the funds to Merrill Lynch] were close in time," and that defendant had planned the trip in order to take a compromising photograph of Melissa "for the purpose of blackmailing Melissa Scripps in order to send her business to Richard Gleeson." Doc. No. 135 at 20. Defendant also argues that Dehaven's testimony would have "undercut" the Government's theory that Melissa knew nothing about defendant's financial dealings. Doc. No. 135 at 26.

The Government argues that because it "never argued that [defendant] planned this trip in advance to later embarrass and blackmail Melissa into switching banks," the timing of the trip is "irrelevant to the government's case and [is] of no evidentiary value to Scripps' defense." Doc. No. 134 at 19. The Government further contends that, given the testimony by Melissa's business partner, defendant's father, and the family accountant, Dehaven's testimony would have added

little to the defense. Thus, the Government argues that defendant has not shown that counsel's performance was deficient or that he was prejudiced by any errors of counsel.

The Court agrees with the Government that defendant has failed to show he was prejudiced as a result of counsel's decision not to call either Rutherford or Dehaven to testify.

First, defendant was not prejudiced by counsel's decision not to call Rutherford to testify about the timing of the Atlanta trip. Defendant has failed to show prejudice as a result of that decision because the timing of the Atlanta trip was irrelevant to the Government's case. As Melissa's testimony at trial shows, the Government argued that defendant used photographs of Melissa taken at the Atlanta strip club to embarrass her, *not* that defendant had planned the trip in advance to acquire embarrassing material on Melissa. On direct examination by the Government, Melissa testified that the trip to the strip club cost $90,000. Doc. No. 135 at 22-23. The Government then directed Melissa to "fast forward" to "that same general time period in 2002 or thereabouts," asking, "In 2002 or thereabouts, did you have a meeting with bankers, at [Bank One]?" *Id.* In response, Melissa testified that she and defendant had met with the trust fund officers "to discuss our accounts and to talk to us about maybe spending habits." *Id.* at 24. When the trust fund officers mentioned the "bill from the strip club," defendant "took out photographs and showed them how much fun I supposedly had participating in that evening." *Id.* at 25. She stated that the photographs "destroyed" her credibility, and that shortly thereafter, defendant introduced her to Gleeson and began the transfer of funds. *Id.*

The Government relied on Melissa's testimony to show that defendant had brought the photographs to the meeting at Bank One to embarrass Melissa, *not* that defendant planned the trip in advance to do so. When that trip occurred was consequently irrelevant to the case. Although the Government suggested in passing that the Atlanta trip and the meeting at Bank One

took place in the "same general time period in 2002 or thereabouts," this was not critical to the Government's case. Thus, Rutherford's testimony that the Atlanta trip took place in 1999 was immaterial to the case, and defendant was not prejudice by counsel's decision not to call him to testify.

Second, testimony by Dehaven would have added little to the defense. As discussed above, Melissa's business partner, defendant's father, and the family accountant testified as to Melissa's spending. Defendant's father also testified that Melissa was aware of defendant's spending habits and often chastised him for it. Thus, the testimony defendant claims that Dehaven would have given that he witnessed Melissa and defendant discussing defendant's spending was cumulative. This Court cannot conclude that defendant was prejudiced by counsel's decision not to call Dehaven to testify.

Given the above stated reasons, defendant has not shown that, had defense counsel called Rutherford or Dehaven as witnesses, there is a reasonable probability that the outcome of the trial would have been different. Thus, this claim for relief is denied.

G. Ground Seven: Appellate counsel was ineffective for failing to challenge the alleged failure of the Court to address defendant "personally" at sentencing.

In his last claim, defendant contends that his appellate counsel was ineffective for failing to argue on appeal that the trial court failed to address him "personally," in violation of Federal Rule of Criminal Procedure 32. Doc. No. 135 at 35. The Government contends that "the district court complied with the spirit and purpose of Federal Rule of Criminal Procedure 32" and that, because the district court did not err, there was no ineffective assistance of counsel in not raising the issue on appeal. Doc. No. 134 at 24, 27.

The Court concludes that it did not err at sentencing. It is well established that counsel cannot be ineffective for failing to object where there is no underlying error. *Thomas v. Horn*,

570 F.3d 105, 121 n.7 (3d Cir. 2009). There was no error in this case, as the Court complied with Rule 32. That Rule provides, "Before imposing sentence, the court must address the defendant *personally* in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii) (emphasis added). The issue presented is whether the Court addressed defendant personally.

The Court afforded defendant an opportunity to speak several times during sentencing. The following exchange occurred during the presentation by defense counsel, Michael R. Dezsi:

> THE COURT: Does he want to talk to me?
> MR. DEZSI: I'm sorry?
> THE COURT: Does he want to speak with me?
> MR. DEZSI: Your Honor, I'm going to confer with my client before we do that.
> THE COURT: Sure. Go ahead.

Doc. No. 134 at 22-23. Defense counsel then completed his presentation, at which point the Court stated, "Okay. You need to speak with him about whether he wishes to speak to me. But I'll hear from the government first." *Id.* at 23. Following the Government's presentation, the Court *again* addressed whether defendant wished to speak:

> THE COURT: Does he want to speak to me, sir?
> MR. DEZSI: Your Honor, having discussed it—the matter with my client, he's opting not to address the court, Your Honor. He will not be making a statement.
> THE COURT: Okay. That's fine . . . .

Id. As the Supreme Court has observed, "Rule 32(a) [now Rule 32(i)] requires a district judge before imposing sentence to afford every convicted defendant an opportunity personally to speak in his own behalf." *Hill v. United States*, 368 U.S. 424, 426 (1962); *accord Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion). This Court afforded defendant that opportunity.

The facts in this case contrast with *United States v. Adams*, 252 F.3d 276 (3rd Cir. 2000), relied on by defendant. In *Adams*, the Third Circuit concluded that the perfunctory effort by the district court to "personally" address defendant constituted plain error, warranting resentencing.

Id. at 289. In that case, the district court stated prior to defense counsel's presentation at sentencing that it "want[ed] to hear if the remorseful defendant ha[d] anything he want[ed] to say." *Id.* at 278. After that court heard argument from both defense counsel and the prosecution, it asked defense counsel if defendant would "like to exercise his right to allocution?" *Id.* "After a pause," without conferring with defendant, counsel replied, "No." *Id.*

In *Adams*, there was no effort by the court or defense counsel to ensure that defendant had an opportunity to consider whether to exercise his right of allocution, unlike in this case. Counsel in *Adams* effectively made that decision for defendant, denying defendant his right of allocution under Rule 32. In sharp contrast, in this case, not only did counsel confer with defendant on the record, but he was directed by the Court to do so. Thus, unlike *Adams*, defendant was able to exercise his rights under Rule 32 in this case and there was no error by the Court or by defense counsel. Defendant's Amended Motion is denied with respect to this ground for relief.

H. Cumulative Error

Finally, defendant argues that "the cumulative errors [by trial counsel] denied him due process of law, and require[] a new trial." Doc. No. 130 at 36. The Third Circuit has held that "[i]ndividual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008). "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome or the trial is such that collectively they can no longer be determined to be harmless." *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2003).

The Court concludes that counsel's alleged errors for failing to object to the *voir dire* questions of the Court, failing to cross-examine David Scripps, failing to use Melissa Scripps's telephone records, and failing to call Rutherford and Dehaven as witnesses did not undermine the fundamental fairness of defendant's trial. Defendant has alleged no facts supporting an inference that his jury was biased by the *voir dire* questions of the Court, and in each of his remaining claims, he argues that counsel failed to provide some piece of exculpatory evidence. Each piece of evidence however, was cumulative or immaterial, as discussed at length above. The Court concludes that the claimed errors by counsel did not deny defendant a fundamentally fair trial.

I. Request for an Evidentiary Hearing

Defendant requests that the Court hold an evidentiary hearing with respect to his claims. Under 28 U.S.C. § 2255, "the question of whether to order a hearing is committed to the sound discretion of the district court." *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, "the [C]ourt must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." *Id.*; *see also United States v. Day*, 969 F.2d 39, 41–42 (3d Cir. 1992). The Court denies defendant's request for an evidentiary hearing in this case because the record conclusively establishes that each of his claims was either time barred or defendant was not prejudiced by any alleged errors by counsel.

Defendant also requests an evidentiary hearing to determine whether $200,000 in funds that were seized by Merrill Lynch may be applied to defendant's restitution order. The Court denies defendant's request on this issue. The Third Circuit has held that "the monetary component of a sentence is not capable of satisfying the 'in custody' requirement of federal habeas statutes." *United States v. Ross*, 801 F.3d 374, 380 (3d Cir. 2015) (citing *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003)). District courts within the Third Circuit and the other

Court of Appeals have similarly concluded "a claim for relief from a restitution order cannot be brought in a habeas corpus petition, whether or not the petition also contains cognizable claims for release from custody." *United States v. Trimble*, 12 F. Supp. 3d 742, 745 (E.D. Pa. 2014) (citing *Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009); *Kaminski v. United States*, 339 F.3d 84, 89 (2d Cir. 2003); *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003); *United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002*); United States v. Hatten*, 167 F.3d 884, 887 (5th Cir. 1999); *Smullen v. United States*, 94 F.3d 20, 26 (1st Cir. 1996)). Thus, defendant's request for an evidentiary hearing with respect to the restitution order is denied.

V. CONCLUSION

For the foregoing reasons, the Court denies and dismisses defendant's Amended Motion without an evidentiary hearing. A certificate of appealability will not issue because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right or the propriety of this Court's procedural rulings with respect to petitioner's claims. *See* 28 U.S.C. § 2253(c)(2) (providing that a certificate of appealability will issue "only if the applicant has made a substantial showing of the denial of a constitutional right"); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

An appropriate order follows.

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MICHAEL SCRIPPS also known as "Michael Scripps Jackson"	**NO. 12-298**

O R D E R

AND NOW, this 25th day of June, 2018, upon consideration of defendant Michael Scripps's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 132, docketed on December 28, 2017), the Government's Response in Opposition to Defendant Michael Scripps' Amended Motion Pursuant 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Document No 134, filed on January 23, 2018), and defendant's Reply to Government's Response to Mr. Scripps' Amended § 2255 Petition [sic] (Document No. 135, filed on February 26, 2018), for the reasons stated in the accompanying Memorandum dated June 25, 2018, **IT IS ORDERED** that defendant's Amended Motion Under 28 U.S.C. § 2255 is **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right or the propriety of this Court's procedural rulings with respect to petitioner's claims. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.